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Nos. 91-1111 and 91-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

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INTEREST OF THE AMICI [1]

Amici curiae Independent Insurance Agents of America, Inc., National Association of Casualty & Surety Agents and National Association of Professional Insurance Agents are non-profit trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. Insurance agents serve as the only integrated point of contact in the insurance marketplace—responding to customer needs and representing company interests. On behalf of insurance companies, agents work daily with the insurance forms and insurance policies used by insurance companies. On behalf of their customers, agents observe and respond on a daily basis to the way that insurance policies are understood, compared and utilized. Insurance agents thus have an important interest in promoting policy reform that responds to the needs of their customers and in maintaining a system by which state insurance regulators and their designees can gather the widest possible array of views on the efficacy of insurance practices. Only by hearing the views of companies and consumers can advisory organizations effectively assess the impact of insurance forms on those who underwrite and those who buy insurance. This case is important to these *amici* because the lower court decision threatens the ability of advisory organizations, such as petitioner Insurance Services Office, Inc., to freely gather information for ultimate use by state regulators.

INTRODUCTION AND SUMMARY OF ARGUMENT

Advisory organizations, such as the Insurance Services Office, Inc., ("ISO"), a petitioner in this case, and the National Council on Compensation Insurance ("NCCI"), have historically been enlisted in state efforts to police

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[1] Petitioners and respondents have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

the insurance industry through their development and recommendation of proposed policy forms: The standardized legal components that, when taken together, compose an insurance contract.[2] That the standardization of policy forms is a valid state goal is not in question. Standardization permits insurance agents and their customers to more easily compare different insurance policies and, therefore, to exercise more informed choice over their purchasing decisions. It establishes certain minimum components, which can be modified or added to by competing insurance companies. Without some kind of standardization, it would be very difficult for insurance agents to compare competing policies and to advise their customers on the differences in coverage and price between different products. In this area, standardization serves to promote—not diminish—consumer choice.

In carrying out their valuable work, advisory organizations have long sought comments on proposed policy forms from a wide body of interested parties in the insurance industry. Through a variety of means, insurance agents and their trade associations provide extensive information to advisory organizations on how policy forms are actually being used—and how new forms would be used—in the marketplace. Insurance agent representatives regularly meet with ISO (i) to improve the coverage aspects of insurance products made available to the public, (ii) to comment upon the impact of proposed forms on insurance agents and (iii) to provide advice and counsel on issues of technical importance.

Through the years, the participation of insurance agents—and of the trade associations that represent them—has assisted the creation of insurance policies responsive to public needs. In the real world, insurance agents act as consumer advocates. Insurance agents pro-

[2] ISO provides policy forms that are used in a wide range of property & casualty insurance coverages. NCCI specializes in workers compensation issues.

moted the idea of packaged personal policies and the Personal Life Combination Policy, which assists consumers in safeguarding their personal assets. At other times, insurance agent representatives have opposed changes in policy forms that would limit consumer choice or impose unreasonable burdens on policyholders. Insurance agents have made their views known on the nature of homeowners' or commercial liability insurance policies by detailing the manner in which specialized versions of such policies are actually used in the marketplace. Similarly, insurance agents have consistently urged greater simplification of forms, so that they can be more easily understood by agents and their customers.

The purpose of such consultation is not obscure. A fully informed process aids advisory organizations, state regulators and, most of all, consumers, who are advantaged by the benefits of successful and informed insurance regulation.

In other words, open dialogue is important to the success of the advisory process—without regard to whether suggestions come from a licensed or un-licensed entity within or beyond state insurance jurisdiction. A good idea is, after all, a good idea without regard to its source.

The marketplace of ideas assumes that the best will be translated into action. But open discussion and acceptance of new proposals can easily lead to charges of "conspiracy": An elastic term of uncertain meaning whose mere appearance on a court pleading can lead to years of expensive and burdensome litigation. It is to avoid just that result that the limited antitrust exemption of the McCarran-Ferguson Act was enacted—so that advisory organizations can fulfill their delegated state function by listening to *all* groups whose views would be of interest to the state regulators themselves—insurers, reinsurers, insurance agents, brokers, buyers, claimants and other regulators.

-This case is important and, for three reasons, this case has been wrongly decided. *First*, the Ninth Cir-

cuit misread *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205 (1979), which sheds no light on the McCarran-Ferguson issue present here. *Second*, the lower court's interpretation of the antitrust exemption cannot be squared with the purposes for which the statute was enacted. *Third*, the Ninth Circuit failed to comprehend that the effect of its ruling would be to prevent states from using the form of regulatory system that they prefer—a right that is manifestly protected by McCarran-Ferguson.

ARGUMENT

The Ninth Circuit decision imperils the ability of advisory organizations to collect the views of interested parties and to pass them along to state regulators. In relevant part, the McCarran-Ferguson Act provides a limited antitrust exemption for "the business of insurance," to the extent that insurance activities are "regulated by State law. 15 U.S.C. § 1012(b). The lower court ruled that the "state regulation" component could not be met in this case because ISO had consulted with foreign reinsurers who exist, according to the Ninth Circuit, "beyond the jurisdiction of the states." App. at 19a. The Ninth Circuit read this jurisdictional limit as a limit, as well, on the scope of the McCarran-Ferguson exemption. But there are at least three fatal defects in the Ninth Circuit's reasoning.

First, as Petitioner ISO has noted, the Ninth Circuit's analysis misreads the precedent of this Court. In *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979), the Court held the McCarran-Ferguson antitrust exemption to be inapplicable because an agreement with druggists "involve[d] parties wholly outside the insurance industry" and, therefore, the defendants could not meet the statutory requirement that they be part of the "business of insurance." The Court's conclusion was based on the "analogous" rule that "an

exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Id.*

As an initial matter, the Ninth Circuit correctly held that in this case the defendants are in the "business of insurance." Unlike *Royal Drug*, none of the "involved parties [is] wholly outside the insurance industry." *Id.* Nonetheless, the court of appeals used the "analog[y]" mentioned in *Royal Drug* to conclude that the defendants were not "regulated by State law" for the purposes of the McCarran-Ferguson Act because ISO had sought the advice of foreign reinsurers which, the court believed, were "immune" from state regulation. Petition for A Writ of Certiorari, Hartford Fire Insurance Co., et al., App. at 20a.

In so holding, the lower court erroneously wrested *dicta* out of context. The *Royal Drug* case turned on whether defendants were engaged in the business of insurance. The language about exempt entities was only an "analog[y]" useful in deciding that question. Defendants here were engaged in the business of insurance. *Royal Drug* therefore has no further bearing on this case.[3]

Second, the lower court's interpretation of McCarran-Ferguson is flatly inconsistent with the purpose for which that limited antitrust exemption exists. The McCarran-Ferguson exemption is concerned with "the type of state

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[3] In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 133 (1982), this Court emphasized that the applicable *Royal Drug* analysis focused on defining the "business of insurance"—not on the meaning of the separate "state regulation" requirement—and explained that, even in that context, the presence of parties wholly "outside the insurance industry" does not necessarily extinguish application of McCarran-Ferguson. The possible application of McCarran-Ferguson to parties wholly outside the insurance industry contemplated by the *Pireno* Court cannot, of course, be squared with the lower court's conclusion that the antitrust exemption was lost because of the presence of foreign reinsurers who compose a vital portion of the insurance industry.

regulation that centers around the contract of insurance . . . [including the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement . . . ." *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Permitting advisory organizations freedom to consult with knowledgeable parties fundamentally advances the purpose of state regulation that "centers around the contract of insurance." The purpose of an advisory organization is precisely to provide states with information and views on the content of insurance contracts and to provide standardized contractual provisions responsive to marketplace concerns. The states are free to accept, reject or modify that advice.[4] But there is no question that the consultative process that offers options for state review goes to the heart of the McCarran-Ferguson exemption because it deals directly with the meaning and content of the contract of insurance. Consultation on that question necessarily requires that advisory organizations —like the insurance regulators themselves—seek the views of people who would be affected by the policy forms; people who include reinsurers (asked to supply layers of the coverage) and insurance agents (asked to explain, sell and service the coverage).

The danger caused by the Ninth Circuit interpretation is obvious. Advisory organizations would be effectively barred from consulting with foreign reinsurers. Moreover, advisory organizations might become wary of dealing with other unregulated entities. Insurance agents in

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[4] The uncontested allegations of this case illustrate the consultative process between ISO and state insurance regulators. After ISO proposed standardized Commercial General Liability forms, various insurance departments held continuing discussions with ISO concerning the content of the proposed forms, ISO prepared revisions of the proposed forms, and, finally, states decided whether to approve the forms. Petition for a Writ of Certiorari, Hartford Fire Insurance Co., et al., at 4-6.

one state might not be licensed to sell insurance in another. Insurance agent trade associations might not, themselves, be licensed entities. But both agents and their trade associations—like foreign reinsurers—represent a repository of experience that is invaluable to an advisory organization considering the adoption of policy forms to be considered by a host of states. This case is, therefore, extremely important to the critical role now played by insurance agents and their trade associations in conveying customer concerns to advisory organizations and, through them, to state regulators. The *amici* themselves, as trade associations representing insurance agents, fear that their ability to offer experience and knowledge would be severely chilled were the Ninth Circuit decision left intact.[5] As importantly, the consumer interest in the existence of a fully informed advisory system would be seriously impaired.

The Ninth Circuit seemed to fear that application of the limited antitrust exemption would lead to untoward results. But the opposite is true. The purpose of the McCarran-Ferguson Act is not infringed if ISO may collect views from a person or association that is beyond the scope of state regulation. The purpose of McCarran-Ferguson is, however, infringed if the advisory process is not permited to fully explore the issues that affect a contract of insurance.

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[5] Although the *amici* believe that consultation by an advisory organization with insurance agents or their trade associations would, even under the holding announced by the lower court, fit within the McCarran-Ferguson exemption (because neither agents nor their trade associations are "immune" from state regulation), the existence of the Ninth Circuit decision, with its flawed reasoning and uncertain reach, now threatens litigation (and further error) where no previous threat had existed. Moreover, the broad implications of the opinion below, coupled with the burdens of antitrust litigation and the severe sanctions provided for antitrust violations, create a substantial chilling effect that could seriously inhibit what *amici* believe is desirable and permissible conduct.

Third, the lower court failed to understand that its cramped reading of the "state regulation" requirement was inconsistent with the express language of state insurance regulation itself. A number of states expressly authorize an advisory organization like ISO or NCCI to "[p]repare and file policy forms and endorsements and consult with *members*, *subscribers* and *others* relative to their use and application." Ark. Stat. Ann. § 23-67-116; Haw. Rev. Stat. § 431:14-107.1; Me. Rev. Stat. Ann., tit. 24-A § 2321-D; Miss. Code Ann. § 83-2-15; *see also* Ken. Rev. Stat. Ann. § 304.13-121 (permitting advisory organizations to consult with "members and others" on use of policy forms); Wyo. Stat. § 26-14-109 (also permitting advisory organization to consult with "members, subscribers and others" on policy forms). The meaning of the statutory reference to "others" is plain: Advisory organizations are permitted to consult with any interested party, like the *amici* here, in order to provide the state insurance regulators with the best possible advice.[6]

These laws simply track common sense. The task given to advisory organizations—to advise on matters of insurance policy—cannot be performed without consultation with those who will supply, sell or be protected by insurance contracts. Consultation cannot be effective unless advisory organizations are permited to seek the views of those with experience and knowledge. Indeed, the better an advisory organization performs its task, the easier will be the job of insurance regulators when they are called upon to decide which policy forms should be used.

The lower court's error was to confuse regulatory reach with regulatory invitation. It may be, as the Ninth Circuit concluded, that certain reinsurers are beyond the scope of a state's insurance regulation and thus could not,

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[6] The State of Colorado has gone even further by establishing a statutory right by which any aggrieved party may file a complaint with an advisory organization requesting the organization "to review the manner in which the [policy form] has been applied with respect to insurance afforded him." Colo. Rev. Stat. § 10-4-418.

for example, be subject to state sanction. But that is not the issue here. Here the state has, through the use of an advisory organization, invited reinsurers to provide their views. That invitation constitutes "state regulation" for the purposes of the McCarran-Ferguson Act. As the district court correctly noted, "[t]he condition of state regulation is satisfied by 'a state regulatory scheme possess-[ing] jurisdiction over the challenged practice.'" App. at 47a (quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984)). Because each state has jurisdiction over the challenged practice—the manner in which an advisory organization formulates advisory policy forms—the "state regulation" requirement is fully satisfied.

Yet the effect of the lower court opinion would be to eviscerate the ability of an advisory organization to collect the informed views of all interested parties. It would necessarily result in the provision of imperfect information. Such a dramatic change in settled practice and law—inconsistent with past Supreme Court precedent—requires the plenary consideration of this Court.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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